UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

LHOIST NORTH AMERICA OF ALABAMA, LLC, A SUBSIDIARY OF LHOIST NORTH AMERICA,

Respondent,

and

UNITED STEELWORKERS,

Charging Party.

Case No. 10-CA-221731

RESPONDENT'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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I. INTRODUCTION

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Respondent Lhoist North America of Alabama, LLC, submits this Reply Brief in Support of its Exceptions to the May 21, 2020 Order of Administrative Law Judge Sharon Steckler.[1] Lhoist's arguments are addressed in its Brief in Support of Exceptions and need not be treated in depth here.[2] Moreover, the essential facts in this case are not in dispute. Charging Party, Desilyn "Floyd" Avery, participated by telephone in an unemployment compensation hearing on June 1, 2018, that exceeded his break time by 25 minutes. Although Avery was on a Last Chance Agreement for prior attendance violations, Avery did not request time off to participate in advance of the hearing, he did not inform his supervisor after the hearing that he had taken an additional 25 minute break, and he took no action to correct his time card so that he did not get paid for the additional 25 minutes. Avery admitted these facts to Lhoist and testified consistently with these admissions during the hearing. These actions violated multiple Company policies and Lhoist terminated Avery's employment for his actions and violations of the policies. To excuse Avery's behavior is to insulate him from the consequences of his actions simply because he is a union officer and is a blatant violation of Lhoist's rights as Avery's employer. The ALJ's decision cannot stand.

II. REPLY

A. Lhoist's Brief Is Not Procedurally Deficient

General Counsel argues that Respondent's Brief and Exceptions are procedurally deficient because they fail to comply with Rule 102.46 in three ways. General Counsel first argues that

[1] Citations to the ALJ's Order are denoted by O. __; General Counsel's Answering Brief is denoted by Answer Br. __; Exc. Br. __ denotes Respondent's Brief in Support of Exceptions.

[2] The arguments raised in the General Counsel's Answering Brief are substantially similar to the Charging Party's in its separately filed Answering Brief. This Reply is intended to serve as a response to both.

Lhoist did not specify the questions involved and to be argued together with a reference to the specific exceptions to which they relate. Answer Br. at 14-15. As explained in Lhoist's brief, the ALJ's misstatements, misrepresentations, and erroneous conclusions of law that she made against Lhoist are so inextricably intertwined that in nearly every instance the ultimate findings made by the ALJ rely upon multiple improper conclusions making it impossible to piece by piece untangle the web holding the ALJ's opinion together.[3]

Second, the General Counsel argues that Lhoist failed to argue or support "several" exceptions in its Brief. Exception 1 concerning the conclusion that Avery did not have any work to do at the time he took the call is addressed throughout the brief. Answer Br. at 15; Exc. Br. at 3, 4, 11, 31. Exception 32 is likewise discussed throughout in that the ALJ's erroneous determination that Lhoist acted in bad faith taints the entire decision. Exception 63 relates to the determination that Lhoist did not provide a clear, consistent, and credible explanation regarding termination thus supporting a finding of pretext and is addressed throughout as well. Answer Br. at 15; Exc. Br. at 12-16, 32-33.

Third, the General Counsel claims that Lhoist waived three arguments by raising them for the first time in its Brief in Support of Exceptions. Again, this specious claim is not supported by applicable law. The "authority" cited by the General Counsel is inapposite. *Little John Electrical Solutions, LLC*, 368 NLRB No. 76, n.1 (September 17, 2019) (*citing Yorkaire, Inc.*, 297 NLRB 401, 401 (1989)). *Little John* dealt with a defense that was not addressed until the Respondent filed

[3] See Questions Presented (Exc. Br. at 16). Even if these references were determined to be non-compliant, when "good faith efforts to comply with Board regulations are made and no prejudice would result to any party," the Board excuses such deficiencies. *See N.L.R.B. v. Washington Star Co.*, 732 F.2d 974, 975 (D.C. Cir. 1984)(describing the Board's procedural rules as confusing). There can be no legitimate claim that General Counsel is hampered in any way as demonstrated by the content of his Answering Brief.

exceptions and it was not discussed in its supporting brief. It makes little sense to argue that Lhoist was required to address adverse inferences that the ALJ had not yet made in its post-hearing brief. Moreover, post-hearing briefs are not included in the record. NLRB Rules and Regulations §102.45(b).

General Counsel also misconstrues Lhoist's points regarding the lack of adverse inferences against the Union. On pages 27 and 32 of Lhoist's exceptions brief, Lhoist points out the biased nature of the ALJ's findings. The ALJ is charged with making a full inquiry into the facts and drawing all inferences that the evidence fairly demands, neither of which occurred in this case. NLRB Rules and Regulations 102.34(a); *Sutter E. Bay Hosps. v. N.L.R.B.*, 687 F.3d 424, 437 (D.C. Cir. 2012). Instead, as Lhoist pointed out, the ALJ failed to apply the same standards to both parties, including but not limited to, applying an adverse inference against Lhoist[4] for failing to call Supervisor Beam or Supervisor Hemphill when the testimony would have been duplicative and unnecessary, but not applying an adverse inference when the General Counsel failed to call Smith and May[5]—all of which was particularly suspect in light of the General Counsel's position in his answering brief that "no adverse inference is appropriate where a missing witness' testimony was unnecessary." Answer Br. at 17.

Finally, Lhoist has consistently characterized Section 16.3 of the implemented CBA as a notice provision and not as a rule, such that there can be no discriminatory application.[6] The

[4] The drawing of an adverse inference against Lhoist does not mean that the testimony would have corroborated the General Counsel's case. *Spurlino Materials, LLC*, 357 NLRB 1510, 1521 (2011). Further, it is improper for an ALJ to rely on adverse inferences to fill in evidentiary gaps. *Riverdale Nursing Home, Inc.*, 317 NLRB, 881, 882 (1995).

[5] The General Counsel argues that May cannot be presumed to be favorably disposed to any party yet ignores the fact that May, an employee that was terminated by Lhoist, is a member of the union. Answering Br. at 17.

[6] The General Counsel again misstates the record regarding Lhoist's 16.3 arguments in n.10 of the Answering Brief.

General Counsel's claim that Lhoist raised this argument for the first time in its Brief in Support of Exceptions is a blatant misrepresentation. See Respondent's Br. at 19-20 ("Separately and in addition to Lhoist's general attendance policies, Section 16.3 of the CBA is a separate notice provision . . . it does not penalize an employee for taking such leave."). Similarly, Lhoist also pointed out in its post-hearing brief that 16.3 remains in the parties' current collective bargaining agreement that was negotiated and went into effect in 2019.[7] See Respondent's Br. at 4, n.6.

B. The ALJ Misapplied *Wright Line* And Relieved The General Counsel Of The Burden Of Establishing Each Element Of The Alleged Violations

1. Avery's Conduct Was Not Protected

The ALJ declared that Avery's participation in the unemployment compensation hearing was protected concerted activity, but she failed to analyze whether the activity was actually protected. O. 23:10-38. In fact, Avery's activity on June 1, 2018, lost its protection when he admittedly failed to properly request time off, failed to subsequently notify his supervisor that he had engaged in non-work related business while on the clock, and failed to correct his time record. He was not compelled by subpoena to attend and give testimony at the hearing, nor did the Company request that Avery participate (as opposed to the occasions when Barry or Berkes called Avery to discuss company-union business). Instead, Avery admits that the hearing officer advised him that Claimant May had provided his name and telephone number. Moreover, Avery now admits that he was acting as a representative for Claimant May. Answer Br. at 33.

The record reflects that Avery spoke to Claimant May a few days before the hearing. The record also reflects that Claimant May knew that Avery's regularly scheduled break was from 9:00 until 9:15, but informed the hearing officer that Avery would be available at 9:15. When Avery

[7] The Union claims that the current 16.3 resembles the pre-implemented CBA provision. There is no record evidence to support this assertion. See Union's Answering Brief at n.9.

voluntarily decided to take his break late at 9:12 and participate in the call for 25 minutes after his break without approval and while on the clock, he lost whatever protection he had under the Act. Otherwise, union representatives and other employees could simply ignore their employer's rules and steal time whenever they decided to discuss "union business" or other work issues.

2. There Is No Direct Evidence Of Animus

The ALJ intentionally misstated the record in order to find direct evidence of animus. "Direct evidence is evidence, which if believed, proves the existence of a fact in issue without inference or presumption." *Hall v. U.S. Dep't of Labor*, 476 F.3d 847, 854 (10th Cir. 2007) (*quoting Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999)).

Examples of direct evidence include:

- A statement that an individual wanted to terminate an employee because he is a Union official. *Serv. Employees Int'l Union Local 1107 Respondent & Javier Cabrera, an Individual Charging Party*, No. 28-CA-209109, 2019 WL 3283303 (July 18, 2019);

- A statement to employee that he should have avoided union activity. *Northeast Lincoln Mercury*, 292 NLRB No. 97, at 6 (1989); and

- A statement that employees were laid off because of their loyalty to the union. *Denholme & Mohr, Inc.*, 292 NLRB No. 13, at 7 (1988).

The ALJ erroneously concluded that statements regarding the reason for Avery's termination[8]—doing union business *during working hours*—is direct evidence of animus. This is not direct evidence of union animus but rather a correct and undisputed statement of the facts.

3. There Is No Indirect Evidence Of Animus

According to the ALJ, the following are expressions of union hostility: (i) statements that Avery was being suspended and terminated because he conducted Union business [during working

[8] The ALJ repeatedly misrepresents the record by omitting "on company time" from her recitation of testimony regarding Avery's termination for doing union business on company time.

hours]; (ii) Berkes' statement that Avery had engaged in the same conduct as he had in January;[9] (iii) Barry's statement that certain unidentified "higher ups" wanted to terminate Avery in January; and (iv) Barry's alleged "go file a charge" statement made to another union representative. The ALJ'S findings are unfounded and speculative.

To find animus based on these alleged facts requires one to make inferences upon inferences, which is not permissible. *N.L.R.B. v. Lampi, LLC*, 240 F.3d 931, 936 (11th Cir. 2001). These statements neither threaten nor coerce and thus cannot be used to establish animus. *Medeco Sec. Locks, Inc. v. N.L.R.B.*, 142 F.3d 733, 744 (4th Cir. 1998)(citations omitted).

a. Lhoist Conducted A Proper Investigation

Although Lhoist had no obligation to investigate in a particular manner, Lhoist conducted a proper investigation given the circumstances. *Sutter*, 687 F.3d at 436; *Detroit Newspaper Agency v. N.L.R.B.*, 435 F.3d 302, 310 (D.C. Cir. 2006); *Chartwells, Compass Group, USA, Inc.*, 342 NLRB 1155, 1158 (2004). Lhoist gave Avery multiple chances to present his side of the events. Although Avery first claimed that he had participated in the hearing while on break, he ultimately admitted that the hearing had extended well into his work time and that he had neither requested nor received permission to skip work and participate prior to doing so or after the hearing. He also testified that he was familiar with Lhoist's policies; he was not working for the 25 minutes that exceeded his break time; and that he should not be paid for hours not worked. What more does an employer need to do if the employee admits to behavior that violates the employer's policies? The answer is nothing.

[9] Avery engaged in essentially the same conduct in January which resulted in his being placed on a Last Chance Agreement. He did not grieve the discipline in January and there is no evidence that the discipline was improper.

The ALJ's discussion and speculation regarding the lack of notes about the investigation and subsequent meeting is no basis for finding animus. There is no evidence that Lhoist follows some routine practice of documenting every phone call regarding a potential termination with contemporaneous notes. Further, any notes taken during the pre-termination teleconference are protected by attorney-client privilege and cannot be the basis of an adverse inference. *See U.S. ex rel. Barko v. Halliburton Co.*, 241 F. Supp. 3d 37, 54-55 (D.D.C. 2017), *aff'd* 709 Fed. Appx. 23, 29 (D.C. Cir. 2017).

The ALJ's preoccupation with Avery's claim that he had no pending work duties is utterly bizarre. The undisputed evidence, including the job description, demonstrated that although Avery's slurry duties took only 6-12 hours of his 40-hour workweek, he had other duties that very often required overtime. It is preposterous to suggest that, unlike any other employee, Lhoist was willing to pay Avery to do nothing when there was always work to be done or that he only "volunteered" to drive the water truck or help with bagging out of the goodness of his heart.

b. Lhoist's Reasons For Avery's Termination Remained Consistent

Avery was terminated for overstaying his break by 25 minutes[10] without prior notice or an after the fact attempt to notify Lhoist, and for not correcting his time records, which are violations of multiple attendance and timekeeping policies. Lhoist has never varied in its position.

Lhoist has never cited a cell phone policy violation as a reason for Avery's termination and Avery himself did not testify that the use of a cell phone during working hours was a reason for his termination. In fact, all witnesses, including Avery, agreed that the policy was that personal use of cell phones was permitted so long as the calls were necessary and brief; otherwise, phone

[10] If Avery's break started at his usual time, then he overstayed his break by 37 minutes as opposed to 25 minutes if he took his break at 9:12. Either way he was paid even though he was not available to perform Lhoist work.

calls were limited to break times. Nevertheless, the General Counsel and ALJ invented a new reason for termination—violation of the cell phone policy—and then used this fabricated reason to find animus. This is just another example of not letting the facts get in the way of a preordained decision.

c. There Is No Evidence Of Disparate Treatment

The General Counsel did not meet his burden to establish disparate treatment, including proving that the alleged comparators did not share Avery's union sentiments. *MEMC Electronic Materials, Inc.*, 342 NLRB 1172, 1198 (2004). Even where disparity is found, it does not require a conclusion that the disparity violates the Act. *New Otani Hotel & Garden*, 325 NLRB No. 168, at 19-20 (1998).

> [A]bsent independent proof of the employer's antiunion animus, even evidence of actual, conscious disparity of treatment by an employer or its agents when it comes to rule-enforcement is generally not a reasonable basis for inferring that the employer's enforcement of the rule in a given instance against an employee who has engaged in union activities known to the employer was motivated in any way by the employee's union activities. There are simply too many other explanations for such phenomena that do not raise concerns under the Act.

Id. at 20.

Here, there is no evidence that Lhoist treated non-union activists who engaged in similar misconduct and with a similar disciplinary history better than Avery. The cell phone policy cannot be used as a basis to find disparate treatment because it was not the reason for Avery's termination. Even so, there is no evidence that Lhoist tolerated any employee speaking on a cell phone during working hours for non-work purposes for a similar length of time.

Likewise, there is no evidence of disparate treatment with regard to other employees who were on a Last Chance Agreement. In determining what discipline to impose on the employees involved in falsifying truck weight records, the fact that the supervisors were involved in the

violations was a significant and different factor that resulted in a Final Written Warning for all but one employee. That particular employee was already on a Last Chance Agreement and had filed multiple EEOC charges against the Company. The supervisors' roles in the incident and the existence of numerous charges were taken into consideration when Lhoist decided not to terminate him at that time and imposed the same discipline across the board.

Avery was on a Last Chance Agreement when he committed a third attendance policy violation in less than three years. The General Counsel has not demonstrated that any other non-union employee with a similar disciplinary record committed a similar offense and received a lesser punishment.

4. A Preponderance Of The Evidence Proves That Lhoist Would Have Taken The Same Action In The Absence Of Union Activity

Avery's Last Chance Agreement made it clear that termination would follow any further violations of Company policies within a year. Avery chose to violate Lhoist's policies again, thereby resulting in the natural consequence of termination. Whether Avery was engaged in Union activities had no impact on his termination. Avery was terminated because he did not request time off, did not notify his supervisor that he had spent approximately 30 minutes on a matter unrelated to work, and did not correct his time records. If he had taken any of those steps, Avery would not have been terminated.

5. The General Counsel Has Not Shown Pretext Or That Animus Was The Reason For Avery's Termination

The ALJ found pretext based on the allegedly faulty investigation, disparate treatment and shifting explanations. Lhoist has addressed these issues in depth in its Brief in Support of Exceptions. There is simply no basis for a finding of pretext. Even if pretext was established, the General Counsel must present substantial evidence that anti-union animus motivated Lhoist's

decision. *Pirelli Cable Corp. v. N.L.R.B.*, 141 F.3d 503, 523 (4th Cir. 1998). The ALJ failed to even address this requirement.

The record evidence demonstrates that Lhoist did not harbor animus against Avery or any other union member. There are no other allegations of unfair labor practices. There is no basis to claim that Avery was singled out for discipline because of his union activities. The General Counsel did not meet his burden of establishing violations by a preponderance of the evidence.

III. CONCLUSION

For the reasons set forth in Lhoist's exceptions and supporting brief, the Board should overrule the ALJ's decision in its entirety. To allow this decision to stand would be to permit the General Counsel and ALJ to substitute their judgment for that of the Company when a union member continuously violates company policies.

Respectfully submitted on this the 13th day of August, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of Respondent's Reply Brief in Support of Exceptions to Administrative Law Judge's Decision on the following by electronic transmission on August 13, 2020 to:

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